

**IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY**

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 5:14-00244

DONALD L. BLANKENSHIP

**UNITED STATES' SUPPLEMENTAL RESPONSE  
TO DEFENDANT'S PRETRIAL MOTIONS 13 AND 14**

Comes now the United States by counsel and respectfully submits this supplemental response to Defendant's pretrial motions 13 (ECF 99) and 14 (ECF 101).

A new Supreme Court decision further refutes Defendant's contentions against what are now Counts Two and Three of the Superseding Indictment. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, No. 13-345, 575 U.S. \_\_\_\_ (2015) (the opinion was issued March 24, 2015, and is attached to this supplemental response). The decision concerns a securities filing that claimed Omnicare was in compliance with applicable laws—claims similar to the claims about Massey that are the basis of Counts Two and Three. The Supreme Court held that Omnicare's statements (and omissions from those statements) could be actionable as false or misleading even though the statements were explicitly phrased as subjective opinions. Specifically, the Court ruled that even if a statement to shareholders consists of a subjective judgment, it may nonetheless be materially false or misleading if the speaker, at the time the statement was made, (a) did not honestly hold the belief expressed, or (b) omitted facts that indicated the statement was made in spite of evidence that contradicted it. In other words, even if the statements alleged in Counts Two and Three were, as Defendant claims, statements of

subjective judgment, they are still capable of being proven false, as well as misleading by omission. *Onmicare* thus provides new support for the denial of Defendant's pretrial motions number 13 and 14.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

It is hereby certified that the foregoing "United States' Supplemental Response to Defendant's Pretrial Motions 13 and 14" has been electronically filed and service has been made on opposing counsel by virtue of such electronic filing this 30th day of March, 2015 to:

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